

## Draft Guidance on Notification and Public Participation for the Movement of Wastes of Concern<sup>1</sup>

### Introduction

This draft guidance contains three parts. The first explains the attributes of wastes of concern and provides examples of wastes that have caused substantial community concern in the past. The second describes a recommended notification process between regions and between the region and the State when wastes of concern are to be shipped. The third provides information on how public participation can be conducted at the potential destination.

### I Definitions and Attributes of Wastes of Concern

#### A. What Are Wastes of Concern?

*“Wastes of Concern”* are those wastes originating from sites or facilities which, because of public concern, local, state or regional political motivations, and/or community interest are potentially not acceptable for treatment and/or disposal at another location or facility. (“Acceptable” in this context refers to community acceptance of a shipment; it does not refer to legal acceptability which is discussed later in this paper.) Wastes of concern frequently cause inordinate consternation in the local community where they are to be treated or disposed. The consternation may involve substantial media or political attention, or protests against the movement of the waste into the community. Frequently, the agency’s top managers may become involved in addressing the situation.

For many residents wastes of concern can produce an emotional or “gut level” response of anxiety or fear. These reactions may be consistent or inconsistent with the judgement of risk assessors or other Agency technical experts on the wastes and the risks they pose. Therefore, a risk assessor’s scientific evaluation of the risk of a waste may be inconsequential in determining whether a waste will prompt concern in potential receiving community.

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<sup>1</sup>This draft document provides guidelines for how Environmental Protection Agency (EPA) regions should interact with one another and States in the potential movement of wastes of concern (WOCs). The purpose is to receive internal EPA comments on potential policies for appropriate notification and public participation in the handling of such wastes. This draft guidance is not a regulation and creates no enforceable rights or responsibilities.

Whether wastes are “of concern” or not is usually determined by local community standards at the wastes’ destinations. Several factors can influence the local community standard, including the context in which the community has learned about the wastes, information that the community previously had about the waste, and media coverage. For instance, wastes that are associated with warfare could be more likely to be wastes of concern than wastes that do not carry these associations. During 1998, for example, the United States Navy attempted to ship napalm, a mixture of gasoline, styrene, and benzene, to a fuel blender in the Midwest. This shipment was turned back to the west coast because the facility was found to be out of compliance with PCB permitting requirements. There also was a substantial amount of opposition at the intended destination. For many of the residents the visual images from the Vietnam War era created a strong emotional reaction to the prospective shipment that overshadowed the experts’ explanation that the napalm was in fact safer to transport than plain gasoline. Later, after substantial public outreach, the Navy was able to send the napalm to a fuel blender in another state. The receiving community had a large number of chemical operations and was less concerned with the risks than the community in the Midwest.

Familiarity with the waste in question may also influence a community’s level of concern. If a community has a history of handling similar substances safely, then typically its residents will have less concern than they will for another substance that has not been handled locally before. Wastes that have been frequent topics in the news also may elicit more concern than wastes which have not received as much press attention. Wastes associated with chemicals that have been high legislative or regulatory priorities seem more likely to be of concern than other wastes.

Community concerns also appear to arise more frequently with clean up wastes than with on-going production processes. These clean up wastes may be Superfund wastes or wastes from the closure or corrective action of a RCRA hazardous waste facility, or some other clean up activity. In the case of clean up wastes, the public may perceive that it is unfair for clean up wastes to be shipped from elsewhere into their community since they were not the beneficiaries of the original process or practices that caused the need for a clean up. Possibly because an ongoing production process, such as at a factory or a plant, must plan for its waste treatment and disposal, such a process seems less likely to spark public concern.

#### B. What are Some Examples of Past Wastes of Concern?

While there is a potential universe of wastes which could be wastes of concern, there are some common elements found in some of the past incidents where waste storage, treatment and/or disposal became public issues. Some of these examples of wastes include radioactive or “mixed waste” materials, dioxins and furans, polychlorinated biphenyls (PCBs), chemical nerve agents, explosives, medical and biological wastes, some pesticides and herbicides (e.g. DDT), and chemicals which were used in warfare (e.g. napalm, phosgene or mustard gas, etc.). Frequently, the wastes are stigmatized through the media and to the public with the words “toxic” or “deadly”, regardless of the actual concentration of the hazardous constituent, the

relative toxicity, reactivity or persistence of the waste material, or the actual or potential risk to affected communities.

C. Does EPA Have a List of Future Wastes of Concern?

EPA does not have a list of wastes that will be universally denoted as wastes of concern. First, since the concern over the waste is a result of the perceptions of the community where it is going, it is impossible to predict what wastes may present considerable concern for a particular community. Second, wastes of concern are a result of a community's response to the waste and are not necessarily aligned with the actual risk from a waste. Having a list of wastes labeled as wastes of concern could imply that these wastes represent greater human health or environmental risk than other wastes, and this would not necessarily be the case. Thus, a listing of wastes of concern could have the unintended consequence of increasing concern over a group of waste that would not merit that concern on the basis of their risk.

II The Notification Process

A. What Has Been OSWER's Previous Policy on Notification?

The Office of Solid Waste and Emergency Response has issued two memoranda specifying regional responsibilities for notifications in Superfund. The September 14, 1989 memorandum from Jonathon Cannon directs EPA regional personnel, prior to the shipment of Superfund waste to an out-of-State waste management facility, to notify in writing that State's environmental officials. The second memorandum from Elliott Laws dated September 8, 1994 directs regional waste management division directors to notify the receiving region before interregional shipments of hazardous substances. As described more fully below, this draft guidance would supersede these blanket notification processes by limiting notification to shipments of potential wastes of concern.

B. Who Makes the Determination That a Waste Is a Waste of Concern?

The determination that a waste should be dealt with as a waste of concern should be made by the regional administrator, or his or her designee, of the receiving region in consultation with the appropriate state official. To facilitate this decision, it is the responsibility of the region where the waste is originating to notify the potentially receiving region(s) as soon as practical that it has a waste that could be coming to the receiving region and that this waste could be a waste of concern. These communications should take place at a high level, i.e. Manager, Deputy Regional Administrator (DRA), or Regional Administrator (RA). Ideally, this notification process should occur before a final determination of whether a waste will be treated on site or off site and before the selection of the final site for shipment of the waste so that public participation (which is discussed more fully below) will have occurred in the communities where the wastes could go. Early notification is important so that the originating region can assess the possible concerns of potential receiving communities in the shipment of a waste, and so that public

participation, if appropriate, can occur at those communities. This early notification allows for a fuller consideration of the merits of on-site and off-site treatment of the wastes. This draft guidance recognizes that for this process to work, the originating region should err on the side of overnotification rather than on undernotification.

This guidance recognizes that this notification is potentially earlier than required by the earlier memoranda and that it can involve notification to regions that ultimately will not receive the waste. This earlier notification is recommended so that public participation can provide a mechanism for the potential receiving community to make its wishes known in this process, and so that any issues do not delay the clean-up process. The guidance also envisions that regions already have a substantial understanding of the types of wastes that could be shipped and become of concern elsewhere. In the event that this is not the case, a particular region may have a larger resource commitment than another. Since this guidance does not envision notification for wastes that are not expected to be of concern, the number of notifications by a region is likely to be lower under this guidance than under the previous memoranda.

C. What Consultation Should Occur Between the Receiving Region and the Potential State?

Because the determination of whether a waste will become a waste of concern at a particular site depends largely upon the community where it is headed, the region should confer with the appropriate state official to determine what additional public participation is indicated. The State official should have a good understanding of the community standards and concerns in the potential receiving location. The originating region should also be available for these discussions. In many cases, the State will have been responsible for the issuance of the permit for a facility and for its inspection. The State should know the level of public involvement in the permit issuance process and whether the shipment of the waste to the facility would be “news” to the community. This process can also be used within a region to ensure that shipments from, for example, a clean-up site do not come as a surprise to the receiving community. For some communities, no additional public participation will be indicated because the community has already received sufficient notice during the permitting process. It is important that the decision on the level of public participation should be made by the receiving region in consultation with the State. The potential receiving region should inform the originating region of the outcome of the discussions on the level of public participation so that this process can be considered in the schedule for action at the originating site.

D. Who Should Be Involved When a Decision Has Been Made to Ship the Waste?

When a transmitting Region determines or becomes aware that a waste of concern will be sent to another Region, the transmitting Region will ensure that the receiving Region is informed, and will inform regions along the transport route if appropriate under the circumstances. These communications should take place at a high level, i.e. Division Director or other Manager, Deputy Regional Administrator (DRA), or Regional Administrator (RA). The receiving Region’s staff should also notify the Headquarters Office of Congressional and

Intergovernmental Relations (OCIR), as well as the regional Congressional and Intergovernmental Office in their own region, as appropriate. The personnel in these offices may be useful in conducting Region-to-Region contact as well since they tend to have ready access to the RA, DRA and Senior Regional Managers. Concurrent communication should take place at the program-to-program level between the transmitting and receiving Regions. Earlier and more communication and coordination will allow the receiving Region the time to provide perspective on the waste of concern to the receiving community. This may help avert the great concern often associated with incomplete information or understanding.

Once a Regional manager or Regional Administrator (RA) has been advised that the transportation, treatment, storage or disposal of a waste of concern is slated for its Region, appropriate management and staff from its program offices (including permitting, enforcement, legal, off-site coordinator and toxicologists), public affairs/community relations, intergovernmental relations and the RA's office generally should be assembled as a regional workgroup. This group should meet early and as often as needed to ascertain known facts, gather missing information, and determine an appropriate communications strategy for informing the receiving community and other governmental entities as deemed appropriate. It is essential that this Regional team work very closely together to ensure that the Region speaks with one voice and delivers understandable, consistent, and accurate information regarding the waste of concern. Finally, the workgroup also needs to determine what, if any, further outreach may be necessary for the local emergency planning groups.

E. What Coordination Should Occur with State and Local Governments?

Generally, when a region knows of a waste of concern shipment, it should, when possible given time and other constraints<sup>2</sup>, notify the State to which the waste will be shipped for storage, treatment, or disposal. In such circumstances, the RA or the RA's Designee (RAD) typically will contact the appropriate State official to determine whether public outreach or notice is appropriate, and, if so, to develop a public communications strategy for the shipment. The State official to be contacted initially will be selected by the RA or RAD in consultation with the appropriate regional program offices. The State official could include, but not be limited to the officials listed below, and the likely, but not required, EPA regional official is also listed:

State Official	Likely EPA Contacting Official
Governor or Governor's Office	Regional Administrator

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<sup>2</sup>Many of the ideas in this paper about the waste of concern implicitly assume that it is part of a cleanup action which is occurring over time. There are also emergency removal actions whose time frame would not provide the opportunity for notification and public participation envisioned in this paper.

State Official	Likely EPA Contacting Official
Environmental Secretary or Commissioner or Director of Environmental Department	RA or DRA or RAD
Solid/Hazardous Waste and/or Superfund Program Manager	RAD
State DOT Manager	RAD
Chairman, State Emergency Response Commission, set up by Governor pursuant to EPCRA	RAD
State Pesticides Manager	RAD

The RA, DRA, or RAD will brief the State official on the waste of concern shipment(s), and suggest that the official designate a primary contact for dealing with the waste of concern shipment on an on-going basis. The RA or RAD and the designated primary State contact will next outline a plan for public communications concerning the WOC shipment, addressing the following points:

1. Which state and local officials and leaders should be contacted, including, as advisable and appropriate, U.S. Representatives and Senators, and who should contact them. (See also III.C.3. below.)
2. What level of public participation is appropriate<sup>3</sup>. (See also sections III.C. and III.D. below.)
3. Develop a schedule for action, and designate state and EPA regional personnel to implement the communications strategy.

The schedule for action should be distributed by the RAD to the appropriate Regional and State and local officials. The RAD will monitor progress of the schedule for action and update appropriate officials.

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<sup>3</sup> The region and State should consider the use of different levels of public participation. For example, for a high level they could use a press release, fact sheet, public meetings and telephone calls to elected officials. For a medium level they could use a press release, fact sheet and telephone calls to elected officials and for a low level perhaps only a press release.

### III The Public Participation Process

#### A. Who Is Responsible for Community Outreach?

The question of who is responsible for the community outreach at the destination site is a difficult one. While the agency or EPA regional office overseeing the cleanup at the generation site should notify the receiving region (and may take the lead on community outreach at the destination), ultimately the receiving region is responsible for ensuring community outreach has occurred. Irrespective of the responsibilities, the receiving region's RA, or the RAD, must be involved. The receiving RA, or RAD, should discuss the potential shipment with the State Environmental Commissioner, who in turn would initiate discussions with local agencies and officials, to decide on future actions. The degree of involvement in the outreach efforts among EPA Regions, EPA Offices, and other agencies is largely a call made by the receiving RA or agency.

While the waste generator may have an active community outreach program at the cleanup site, the point of generation, they historically have seldom had community outreach efforts at the destination communities. However, generators have a vested interest in ensuring that issues are resolved. If the public outreach efforts do not address the level of community concerns, the generating region may be without a disposal facility at a late point in the operation and may suffer a tarnished public image which could harm future projects. Therefore, it is the best interest of the generating region and other involved agencies to play as active a role as possible in ensuring appropriate public outreach.

#### B. Who Determines the Appropriate Level of Outreach?

The question of the appropriate level of community outreach should, also, be decided by the receiving RA, or RAD. This decision, however, is not made in a vacuum but should be made with the consultation of state and local officials who will usually have a better sense of community concerns. The receiving facility permits may already include the wastes of concern under consideration, therefore, additional permitting steps, which would include public outreach, could be considered unnecessary. However, this factor alone is not necessarily grounds enough to dismiss or conduct a low level public outreach program. Destination communities may not have voiced opposition to wastes of concern during the permitting process because they did not understand that wastes of concern were within the categories of potential waste to be disposed, treated, or stored at the local facility. The RA or RAD, state, and local authorities should determine whether such lack of understanding is grounds for the permitting agency to take responsibility for community outreach.

#### C. What Are the Elements of Effective Community Outreach?

##### 1. Background research

Effective community outreach may require some advance research to identify and characterize potentially affected populations. Preliminary research will help in determining how and at what level to involve local communities and address their concerns. Following is suggested background research:

- a) Review of existing demographic studies - income, minority, language, employment versus unemployment, population density, rural versus urban environment, etc. . . This information will help in understanding who is living in specific tracts and under what conditions.
- b) Social characteristics - nations of origin, predominant language, predominant cultures, and education levels. This information is important when planning how to communicate with the community.
- c) Existing environmental controversies. If present, these controversies are indicators of the type and degree of community concerns.
- d) Proximity of the site to frequently used or sensitive sites - schools, hospitals, playgrounds, parks, community centers, local churches, and neighborhoods. Communities may feel a greater threat from facilities in close proximity to sites frequented by the community members, particularly children.

## 2. Environmental Justice Considerations

Under Executive Order 12898, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States. Furthermore, each federal agency shall conduct its programs, policies, and activities that substantially affect human health and the environment so that they do not have the effect of subjecting persons to discrimination because of their race, color, or national origin. This requirement applies to the disposal of all wastes.

## 3. Early Community Notification and Involvement

Early community outreach is paramount. Community members who are notified and involved early in the planning process may be less adversarial (in the long run), more amenable to conflict resolution, and more supportive of the operation. People prefer to have some control over decisions with the potential to profoundly influence their lives. Additionally, people are less likely to trust and support decisions which involve them but were made without their knowledge and consent. Waiting too long to tell the public about operations which elicit emotional responses can give the impression that an agency is doing something underhanded.



Following are some key suggestions for the notification and involvement process:

- a) Identify and include key community, local, and state people.
  - 1. Community members such as elected officials, prominent and outspoken people, and local educators.
  - 2. Local planning and permitting agency, local fire and emergency response department.
  - 3. State permitting agency and elected officials.
- b) Notify and involve key people and community members as early as possible.
- c) Determine where there are areas of agreement and the potential for disagreement as early as possible.
- d) Seek to resolve simple issues in the beginning, when possible. This helps build a ground and a rapport with the community for dealing with more controversial issues later.
- e) Provide ample opportunities for community members to express their concerns and to have them responded to.
- f) Inform the community on the public involvement process and their opportunities to participate.
- g) Maintain open and honest communications with the public.
- h) Communicate risks in language and terms understood by the general community.
- i) Communicate emergency and contingent procedures. Involve local fire and emergency response personnel in planning and outreach efforts. This step may go a long way to put people more at ease regarding their safety.

Community outreach must be a two-way exchange. Agencies should be willing to actively listen to and address public concerns. Merely supplying the community with facts, without directly addressing their concerns or allowing for a response, does little to reduce conflict. Additionally, community knowledge should not be discounted. They may have valuable insights on the appropriateness of particular site for the waste of concern under consideration.

All communication and information should be in language and terms understood by the community; not doing so can have the effect of shutting community members out of the process. It may be advisable to enlist the help of impartial and well respected community members to convey information when the community may be mistrustful of the information given by federal and state

agency officials. Local college or high school professors, doctors, and scientists can communicate more difficult technical information in terms understood by the general community.

D. Who Should Be Included in Public Outreach?

Community outreach should be focused on the potentially affected communities, but realistically, it may extend to the general public as national environmental and special interest groups get more vocal. Efforts should be made to distinguish between individuals and groups within the potentially affected areas from those outside; background research in the initial stages of the operation will aid in identifying these groups. Additionally, efforts should be made to determine if the agendas of groups outside of the area reflect, or possibly conflict with, the interests of potentially affected communities. Ultimately, it is the support of the local potentially affected population and their representative officials and agencies that is most important.

E. Can community opposition legally prevent a facility from receiving a waste of concern?

The answer to this question can depend upon the exact circumstances. For example, a permitted RCRA facility that is legally eligible to receive a waste that is not part of a Superfund clean up has the legal right to receive that waste under federal law. However, in the remedy selection process under Superfund, community acceptance can be considered, and community acceptance can be interpreted to apply to the community that would receive the waste. Also, a facility must be legally able to accept a waste, which includes being in compliance with the Off-Site Rule, before a Superfund waste can be shipped to it. There can be nuances and situations that this draft guidance has not addressed. If there are legal questions in a particular instance, it may be advisable to consult with regional counsel about them.

F. What are the implications for EPA's permitting program?

EPA should ensure that a prospective permittee clearly discloses the types of waste that a facility could accept as part of its permitting process, and, where EPA is not the permitting authority, encourage similar disclosure in authorized states in their process. By making the public aware of the types of waste that a facility will be accepting, there can be better public participation in the process. This notification can reduce the reaction that a community expresses when a particular waste is to be shipped to them.